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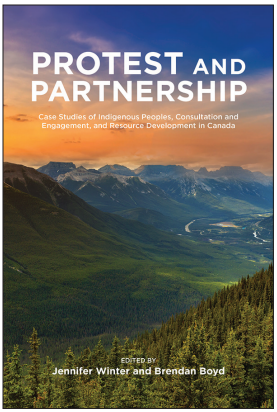

PROTEST AND PARTNERSHIP: CASE STUDIES OF INDIGENOUS PEOPLES, CONSULTATION AND ENGAGEMENT, AND RESOURCE DEVELOPMENT IN CANADA

Edited by Jennifer Winter and Brendan Boyd

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Indigenous, Industry and Government Perspectives on Consultation and Engagement in Resource Development[1]

Brendan Boyd, Sophie Lorefice, Jennifer Winter

Proposed resource development projects in Canada are frequently on or near the traditional territories of Indigenous[2] Peoples, which affects the rights of Indigenous Peoples and triggers the Crown's fiduciary duty to consult. In many instances, projects are subject to protests and court challenges from Indigenous communities or groups. Recent examples include the Trans Mountain and Coastal Gaslink pipelines in BC; hydraulic fracturing for oil and gas exploration in New Brunswick and Nova Scotia; seismic testing in Canada's north near Clyde River; lobster fisheries in Atlantic Canada; and hydroelectric and mining projects in BC and Nunavut. While these cases represent a small portion of the total incidences where the duty to consult is triggered, they often become the subject of intense political and public debate.

As discussed in the introduction to this volume, many scholars argue that the institutions and processes used to engage Indigenous Peoples in resource development cannot lead to empowerment because they are defined and determined by the state and industry, while Indigenous People have no control over these processes and their legal and governance traditions are not represented (Alfred 2001; Palmater 2015; Borrows 2016). Specifically, weak policy and legislative support for Indigenous self-determination leaves Indigenous communities with little power to make decisions about natural resource development (Borrows 2016). Others argue that the dichotomy posed for Indigenous communities between economic development and the

preservation of rights and traditional practices is overdrawn (Notzke 1995; Anderson 1999, 2002; Slowey 2009; Angell and Parkins 2011). They suggest Indigenous Peoples are not just passive recipients of the impacts of resource development. For example, Slowey (2009) argues that participating in resource development has the potential to empower Indigenous groups and give them greater capacity to navigate and manage these changes, while preserving their rights and identity. However, criminal prosecution of individuals and communities who exercise their rights outside of formal agreements and processes undermines the capacity of Indigenous communities to engage in self-determined resource development (Palmater 2015). We argue that, in either case, it is essential to consider how Indigenous Peoples perceive and understand the institutions and processes through which they are currently involved in resource development. Several scholars argue that a shared vision between Indigenous groups and proponents of resource development projects does not exist (Borrows 2016; Manuel 2017; Simpson 2017). Manuel and Derrickson (2017) note that the Auditor General of Canada has indicated that all parties must share a common vision of their relationship for treaty negotiations to be successful. They argue that this does not currently exist in the BC treaty process, and that promises of reconciliation have become entangled in the modern treaty process wherein reconciliation becomes a tool of disenfranchisement and a means of severing Indigenous Peoples from their lands. It is therefore essential to examine how Indigenous Peoples' ideas about these institutions and processes differ from those of government and industry.

In this chapter, we analyze policy statements and guideline documents related to consultation[3] and engagement to understand how Indigenous Peoples view and understand key concepts associated with consultation and engagement processes and compare their perceptions to those of government and industry. Bridging the differences between frames or worldviews is an important first step in improving consultation and engagement with Indigenous groups in resource development decisions and developing a shared vision (Borrows 2016; Manuel 2017; Simpson 2017; Boyd and Lorefice 2018). Gallagher (2011) argues that, given the historical success of legal challenges, unless relations with industry and government improve, Indigenous groups will continue to use the legal system to defend their rights. The legal system is a time-consuming and financially costly avenue for dispute resolution and its adversarial nature is not conducive to the development of positive relations. Moreover, legal standing does not translate into practical change

when Canadian governments fail to uphold those rights (Palmater 2020). The courts are also a powerful tool for government and industry to dismiss or resist Indigenous claims, as project proponents are able to secure injunctions in response to Indigenous resistance (Manuel and Derrickson 2017). Thus, finding common ground amongst Indigenous Peoples, governments, and industry on engagement and consultation practices is imperative to upholding Indigenous rights, the future of resource development, the Canadian economy, and ultimately to the reconciliation of the relationship between Indigenous Peoples and the rest of Canada.

The remainder of the chapter proceeds as follows. First, we present a short outline of the research approach and methodology. Most of the chapter is a discussion of the results of our analysis. We provide a detailed review of policy documents, comparing the use and frequency of identified keywords, such as *consultation*, *reconciliation*, *veto* and *consent*. Following our review, we conclude with a summary of our results and identify some areas of future research based on our analysis.

Research Approach and Methodology

The documents used in the analysis are policy statements or guidelines, designed to inform and guide individuals and organizations in implementing the duty to consult or in engaging with Indigenous communities. Between 2016 and 2018, we gathered policies and guidance documents through an extensive online search and separated them into the three categories: Indigenous groups, industry, and government. The search produced 61 documents: 17 from industry, 22 from Indigenous groups and 21 from government; the appendix reports the full list. The industry documents include documents from companies and industry associations. Documents from Indigenous groups include documents from First Nations, Indigenous political institutions, and Indigenous associations. The number of documents from each group is not the same; however, exact symmetry is difficult to achieve and not necessarily valuable because every document varies in length.

Using NVivo software, which allows systematic coding and organization of textual data, we conducted a quantitative content analysis, counting the instances of a reference (Viasmoradi, Turunen, and Bondas 2013). We assessed and compared the frequency of occurrence of keywords in the documents in each category (Indigenous groups, government, and industry). This provides an indication of the level of importance placed upon central concepts by

each of the actors. Each word search included stemmed words. For example, counts of the term *sustainable* included the word *sustainability*, and searches of the term *relationship* also included its plural, *relationships*. To ensure that differences in word counts are not related to differences in the number and length of documents, we report and analyze the number of mentions per every 10,000 words.

The documents include Indigenous groups in different regions of the country; all provinces, the federal government, and the Government of Northwest Territories[4]; and a cross-section of resource industries. However, caution should be exercised when generalizing about how each actor understands consultation or how they believe it should be implemented. This is particularly true for Indigenous groups. In many Indigenous cultures, knowledge and history is shared and passed down orally rather than in written form. Thus, many of the protocols and guidelines that Indigenous groups have regarding consultation may not be captured in a review of publicly available documents. Given that there are hundreds of First Nation, Inuit, and Métis communities in Canada, it is difficult to make conclusive generalizations about a common approach to consultation and engagement. Finally, we do not intend to speak for the Indigenous Peoples, groups, and communities whose documents have been included in this chapter. The final source of information and interpretation of these documents is, of course, the communities and organizations who created them. Nevertheless, these publicly available documents provide a window into the understandings, motivations, and issues that Indigenous groups, along with government and industry, have regarding consultation processes.

Detailed Review of Policy Documents

Drawing on the approach of Boyd and Lorefice (2018), we examine several areas where differing views among Indigenous groups, industry, and governments may create barriers to the meaningful involvement of Indigenous Peoples in resources development. These include the terms used to describe Indigenous Peoples' involvement in resource development; the connection to reconciliation; and whether the duty to consult provides a veto to or requires consent from Indigenous Peoples. We also compare these groups' perspectives on key issues associated with the process of consultation and engagement, including delegation of the duty to consult to third parties; provision of capacity supports; the time allotted for discussion and debate; information-sharing

and transparency from project proponents; and the inclusion of traditional knowledge in decision-making.

Consultation, Engagement and Accommodation

As discussed above and elsewhere in this book, Canadian courts prescribe and shape the definition and practice of the duty to consult. Legal definitions notwithstanding, different terms are used to describe Indigenous Peoples' involvement in resource development. The terms consultation and engagement are often used in concert or even synonymously. However, consultation refers more to the Crown's legal obligation to meaningfully consult with Indigenous Peoples prior to making a decision or taking a course of action that may affect their rights and privileges, in accordance with Section 35 of the Constitution Act and the many subsequent Supreme Court, Federal Court of Appeal, and subnational courts' rulings in this matter. Engagement refers to a range of actions taken by private companies as they interact with Indigenous Peoples to find common ground on a proposed project. Engagement activities can support the Crown fulfilling its legal obligations but is a broader term, which means that we would expect industry to use the term engagement more than government and Indigenous groups that are involved directly in the duty to consult. Often engagement is viewed as a deeper form of involvement that allows for a back-and-forth dialogue and greater participation by the group being engaged. Consultation is a narrower process where feedback is received from a stakeholder on a decision or plan that is almost fully formed. Comparing the incidence of these two terms gives us insight into how each group views the involvement of Indigenous Peoples in resource development decisions.

A key component of the duty to consult, explicitly stated by the courts, is that Indigenous Peoples must be accommodated when it is found that a project infringes upon their rights. But Indigenous groups indicate that there is too much focus on the initial consultation procedures and whether the duty to consult is being conducted fairly, compared to the time spent on ensuring the processes lead to substantive outcomes through accommodation, including amendments to a project, revenue sharing, economic development opportunities, access to resources, and capacity building (Hupacasath First Nation 2006; First Nations Leadership Council 2013). We would expect Indigenous groups to use the term accommodation more than government and industry.

To assess how often the terms *consultation*, *engagement* and *accommodation* were used, we compared their frequency across each actor's documents. Figure 1 shows that industry used the term *engagement* the most of all three actors. However, all three used the term less frequently than *consultation*. Both *consultation* and *accommodation* appear more in government documents than those of Indigenous groups and industry. However, the difference between the frequencies of use of each term is greatest among government documents. It is also worth noting that the frequency of use for both terms is the highest amongst any other term examined.[5]

Governments tend to view accommodation more as a process of seeking compromise in an attempt to harmonize conflicting interests and stress that a commitment to the process does not require a duty to agree (Gouvernement du Québec 2008; Government of British Columbia 2014; Government of Nova Scotia 2015). Industry does not make frequent mention of accommodation, though the Association for Mining Exploration British Columbia (2015) takes a similar approach as government in highlighting that consultation does not necessarily mean reaching agreement but provides a forum for discussion.

As discussed above and in other chapters, the duty to consult is prescribed and shaped by the Canadian courts. However, notwithstanding the legal definition, the general concept of consultation may be used with different meanings. For example, there are several definitions of consultation in the documents we examined. The Government of British Columbia (2010) states that "consultation in its least technical definition is talking together for mutual understanding." From industry, the Association for Mining Exploration British Columbia (2015) states "consultation and engagement are about sharing information, listening to and respecting concerns raised, and looking for ways to address those concerns in a manner that is reasonable and commensurate with the nature, scope and duration of the exploration activities being carried out." The Assembly of First Nations of Quebec and Labrador (2005) suggests "consultations are an excellent opportunity for First Nations to exercise their jurisdiction over, and their social and economic interest in, lands and natural resources." These definitions display differences in how each group approaches consultation. For Indigenous groups, it is about political and legal empowerment. This contrasts with the other definitions, which use language oriented to strengthening existing relationships and processes.

Canadian court cases have also emphasized that consultation must be meaningful. However, as with consultation, definitions and interpretations

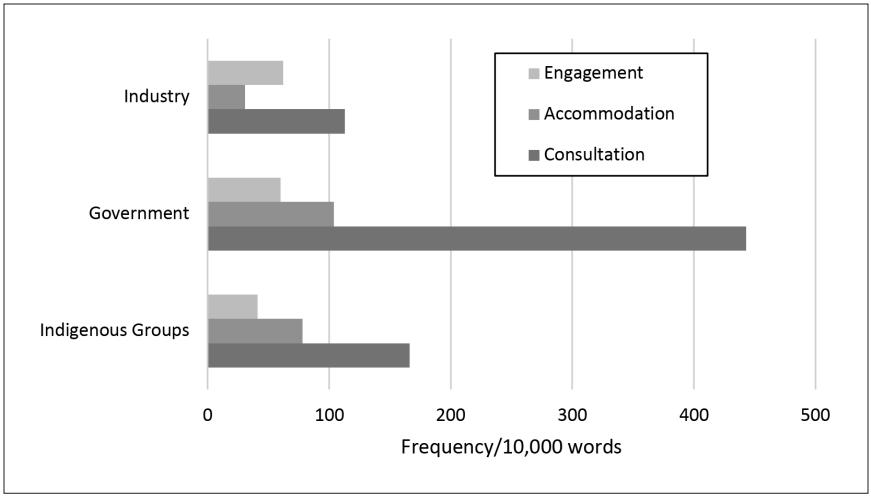

Figure 1.1: Frequency of Use of "Consultation," "Engagement," and "Accommodation

may differ. Indigenous groups that addressed meaningful consultation suggested that it required being engaged early, allowing sufficient time for input to be prepared and considered, and having a say in strategic planning decisions (Kluane First Nation 2012; Meyers Norris Penny 2009; Sam n.d.). AANDC[6] (2011) states "a meaningful consultation process is characterized by good faith and an attempt by parties to understand each other's concerns, and move to address them." This means consultation is "carried out in a timely, efficient and responsive manner; transparent and predictable; accessible, reasonable, flexible and fair; founded in the principles of good faith, respect and reciprocal responsibility; respectful of the uniqueness of First Nation, Métis and Inuit communities; and, includes accommodation (e.g. changing of timelines, project parameters), where appropriate" (AADNC 2011). Governments also recognize that meaningful consultation is an iterative process rather than a single action or event (Fisheries and Oceans Canada 2006; AANDC 2011; Nova Scotia 2015). For example, AANDC (2011) indicates that departments and agencies are encouraged to develop long-term working relationships and processes rather than working together only on an ad hoc or case-by-case basis. Industry documents did not provide a clear definition of meaningful consultation. The Calgary Chamber of Commerce (2015) indicates the need for a clear definition but does not offer one. Several industry documents did

note the importance of involving Indigenous Peoples in determining the process itself and ensuring it is acceptable and informed by the interests of Indigenous communities (Canadian Association of Petroleum Producers 2006; Association for Mining Exploration British Columbia 2015; Canadian Wind Energy Association n.d.).

The 1996 Report of the Royal Commission of Aboriginal Peoples highlighted the need for a nation-to-nation relationship between Indigenous Peoples and the Canadian state (Dussault et al. 1996). While the phrase has become popular in recent years, it has yet to occur in a meaningful way. Palmater (2011) and Manuel and Derrickson (2017) suggest that there has been no desire on the part of elected governments to implement or support mechanisms that would achieve self-governance. Court rulings have not necessitated or facilitated a nation-to-nation relationship. For example, Palmater (2018a) argues the *Mikisew Cree First Nation v. Canada* decision, which ruled that the duty to consult did not apply to the legislative branch of government, means there is no duty on the part of the Canadian state to engage Indigenous Peoples at the highest levels of lawmaking. Alfred (2001) states that a nation-to-nation relationship is not possible as long as Canadian laws and institutions are dominant and apply on Indigenous lands. The documents examined in this chapter outline that consultation should be driven by the political will to establish a nation-to-nation relationship (Assembly of First Nations of Quebec and Labrador 2005; Federation of Saskatchewan Indian Nations n.d.; National Centre for First Nations Governance n.d). Government documents tend to view the purpose of the duty to consult as fulfilling legal requirements (e.g., AANDC 2011; Government of Alberta 2014). The Government of Alberta (2014) states that the purpose of its policy is "to be consistent with case law and demonstrate a practical approach to meeting the requirements established by the courts." There are a few exceptions; notably, the Government of British Columbia (n.d.) and the Government of Nova Scotia (2015). The BC policy on consultation emphasizes the need for "government-to-government relationships where First Nations are rights-holders not stakeholders" (Government of British Columbia, n.d.). Industry documents stress mitigating uncertainty faced by resource companies, which affects their operations and ability to raise capital, through effective relationships (Alberta Chamber of Resources 2006; Canadian Association of Petroleum Producers 2006; Association for Mining Exploration British Columbia 2015; Canadian Wind Energy Association n.d.). The Alberta Chamber of Resources (2006) states

"corporate image and reputation have become important in marketing goods and services, and even in the ability to access certain markets. A positive image with respect to Aboriginal relations can be a significant competitive advantage in the marketplace."

Perspectives on Reconciliation

In the reason for decision of the *Clyde River* case, Justices Karakatsanis and Brown state, "this court has on several occasions affirmed the role of the duty to consult in fostering reconciliation" (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017, s. 1). Thus, reconciliation could be an important purpose or motivator for engaging in consultation. The principle of reconciliation refers to "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country" (Sinclair 2015). However, many scholars have argued that the phrase has become symbolic, meaningless, or worse, a means to assimilate Indigenous Peoples and continue resource development on their land (Alfred 2001, 2009, 2017; Manuel and Derrickson 2017; Palmater 2017, 2018b, 2021). To assess how important reconciliation was to each group, we compared the frequency with which each used the terms *reconciliation*, *relationship*, *respect*, and *trust* (figure 2). Documents from Indigenous groups referenced reconciliation 18 times per 10,000 words. This was twice as frequent as government, and six times more frequently than industry. Trust was mentioned seven times per 10,000 words by industry, three times by Indigenous groups and one time by governments. Of note is the importance all three groups placed on the word *relationship*, with equal occurrences in Indigenous and industry documents (40 per 10,000), and higher frequency than respect.

Approximately half of the government documents accounted for the references to reconciliation. As an example of the language used, AANDC's consultation policy states "the Crown's efforts to consult and, where appropriate, accommodate Aboriginal groups whose potential or established Aboriginal or Treaty Rights may be adversely affected should be consistent with the overarching objectives of reconciliation" (AANDC 2011). Just under half of Indigenous groups' documents mentioned reconciliation at least once. The National Centre for First Nations Governance (2009) states that "the consultation and accommodation process is driven by the primary purpose of reconciliation." Less than a quarter of industry documents mentioned reconciliation as part of the process of consultation and engagement.

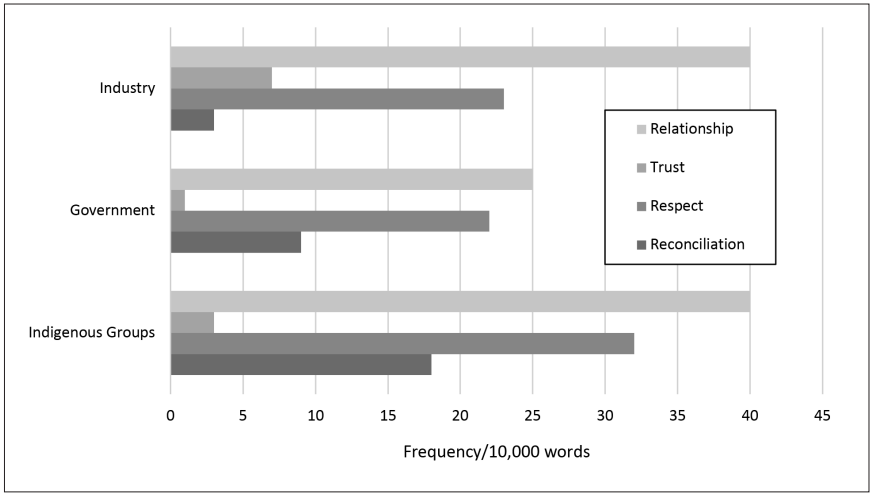

Figure 1.2: Frequency of Use of "Relationship," "Trust," "Respect," and "Reconciliation"

One document, from the First Nations Leadership Council, indicated that it does not see a good faith attempt at reconciliation through consultation by government: "rather than building the relationships, trust and momentum required for the transformational change that reconciliation requires, the Crown's approaches to consultation and accommodation are fueling growing impatience, frustration, and conflict" (First Nations Leadership Council 2013). The First Nations Leadership Council argues that the number of court challenges against government decisions, such as approvals of major resource projects or pipelines, highlights that the duty to consult has not been implemented in a way that advances reconciliation.

Differing Perspectives on Consent Versus Veto

Whether Indigenous communities or nations have a veto—and whether consent is the same as a veto—when resource development infringes upon their rights remains an unsettled question that is slowly being resolved through the court system. The use of the terms *consent* and *veto* in the documents examined sheds light on the perspectives of the three actors and how they interpret the rights of Indigenous Peoples.

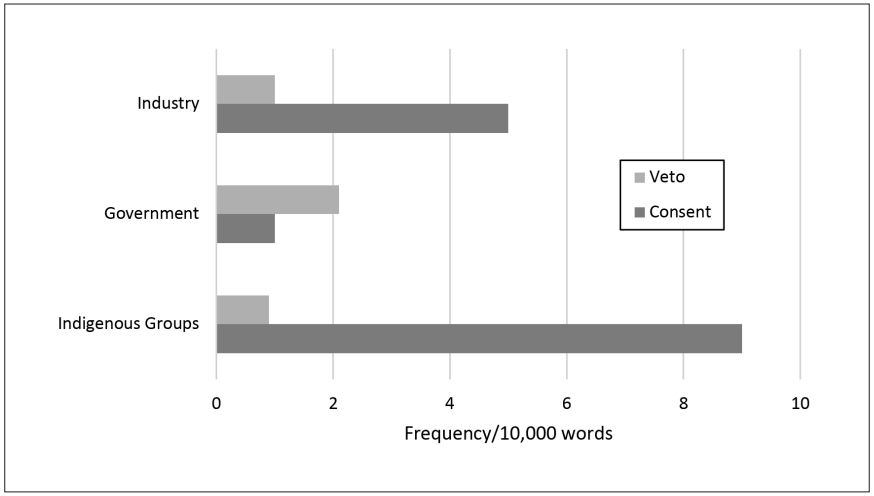

Figure 1.3: Frequency of Use of "Veto" and "Consent"

Figure 3 compares the frequency with which Indigenous groups, government, and industry used the terms *veto* and *consent*. Indigenous groups mentioned consent nine times per 10,000 words, while industry and government referenced the term four times and once per 10,000 words respectively. Conversely, government used the term veto 2.1 times per 10,000 words, approximately twice as frequently as Indigenous groups and industry. Perhaps not surprisingly, the documents produced by Indigenous groups highlight the language used by the courts, which indicates that consent is required (Hupacasath First Nation 2006; Kluane First Nation 2012; Sam n.d.). Government and industry documents focus on the courts' assertion that the duty to consult does not grant Indigenous Peoples a veto on projects (AANDC 2011; Government of Alberta 2013; Association for Mining Exploration British Columbia 2015; Mining Association of Manitoba 2016). The First Nations Leadership Council (2013) provides an interesting perspective in arguing that no actor has a veto if true reconciliation is the goal. The First Nations Leadership Council suggests that this reflects the tradition of many Indigenous groups of consensus-based decision-making, where deliberation continues until all parties agree on a decision. Further, the document indicates that, while Indigenous groups may not desire to completely stop a

project on their own, the notion that it would move forward without their agreement demonstrates a lack of respect for their concerns and rights.

Delegation of Procedural Aspects of Consultation

Canadian governments can delegate procedural aspects of the duty to consult to third parties (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*). We examined the frequency of use for the terms *delegation* and *procedural aspects* to compare how important this concern was for each group. As figure 4 shows, governments discuss delegation and procedural aspects of the duty to consult much more frequently than Indigenous groups or industry. Government documents state that procedural aspects involve meeting with Indigenous communities, sharing and discussing information, identifying project impacts, and implementing mitigation measures (Government of Alberta 2013; Government of British Columbia 2014; Government of Nova Scotia 2015).

The rationale for delegation identified in the documents is that proponents are generally in a better position to fulfill this role because they have intimate knowledge of the project (for example, Government of British Columbia 2014). This was seen by some Indigenous groups as the Crown shirking its responsibility and not promoting positive relations. For example, the First Nations Leadership Council (2013) indicates that just because delegation is legally permissible does not mean it is appropriate, acceptable, desirable, or meaningful. Industry's primary concern is having clarity on their responsibilities and a smooth transition to government consultation when issues are outside their authority, such as a royalty-sharing agreement (for example, Canadian Chamber of Commerce 2016).

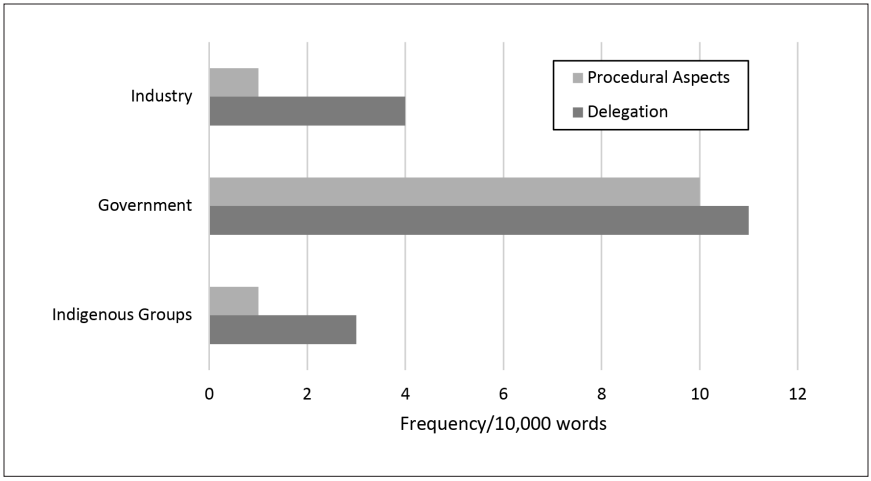

Figure 1.4: Frequency of Use of "Procedural Aspects" and "Delegation"

Timing of Consultation

An important concern for Indigenous groups was that consultation processes are often rushed, and that insufficient time is dedicated to establishing trusting relationships and allowing for respectful and meaningful consultation (for example, Assembly of First Nations of Quebec and Labrador 2005; First Nations Leadership Council 2013). Indeed, the Federal Court of Appeal ruled that federal government consultation on the Northern Gateway pipeline was "brief, hurried and inadequate" (*Gitxaala Nation v. Canada*, at sec. 325). However, one industry document expressed concerns about timeline extensions delaying a project and increasing uncertainty (Calgary Chamber of Commerce 2015). Government documents discuss timing of consultation relative to statutory requirements, but the Government of Saskatchewan (2013) also stressed the importance of voluntary engagement prior to formal processes. This document highlighted the potential for early engagement to address problems before they arise and build working relationships with Indigenous communities. The document indicated that early engagement is important when determining the level of capacity funding necessary to ensure that members of Indigenous communities can adequately participate in consultation processes. The Assembly of First Nations of Quebec and Labrador

(2005) suggested that seasonal customs and traditions of Indigenous Peoples should also factor into timing, thus creating a need for flexibility in terms of government and industry consultation processes.

Capacity Building

Capacity building refers to attempts to increase revenue, skills, infrastructure, etc., in Indigenous communities to address asymmetries in wealth, power, and knowledge that can limit effective implementation of the duty to consult and engagement. The issue was important to all actors, but potentially most important to industry, which mentioned the term *capacity* twice as frequently as government, with mentions by Indigenous groups falling about midway between the other two (figure 5).

Governments recognize their responsibility and are generally amenable to providing capacity support (e.g., Government of Manitoba 2009 and AANDC 2011). Of particular interest is a Government of Alberta program, the First Nations Consultation Capacity Investment Fund, which provides ongoing support for communities to participate in consultation processes and is funded by industry (Government of Alberta 2013). As noted previously, project proponents are not legally obliged to provide supports through the duty to consult.[7] However, Indigenous groups, government, and industry all note that it can help build relationships and trust (e.g., Kluane First Nation [2012], Government of Saskatchewan [2013], and Association for Mining Exploration British Columbia [2015]). The Association for Mining Exploration British Columbia (2015) raises concerns about support provision, including their ability to fund supports, ensuring funding is commensurate to the level of consultation, and ensuring that it benefits the entire community, not just a few individuals. Capacity issues can be exacerbated by the high number of consultations facing many communities and the potential for fatigue in communities (Government of Northwest Territories 2012). One community has called on government and industry to look for more creative ways, beyond monetary support, to ensure the full involvement of Indigenous Peoples in consultation processes (Hupacasath First Nation 2006).

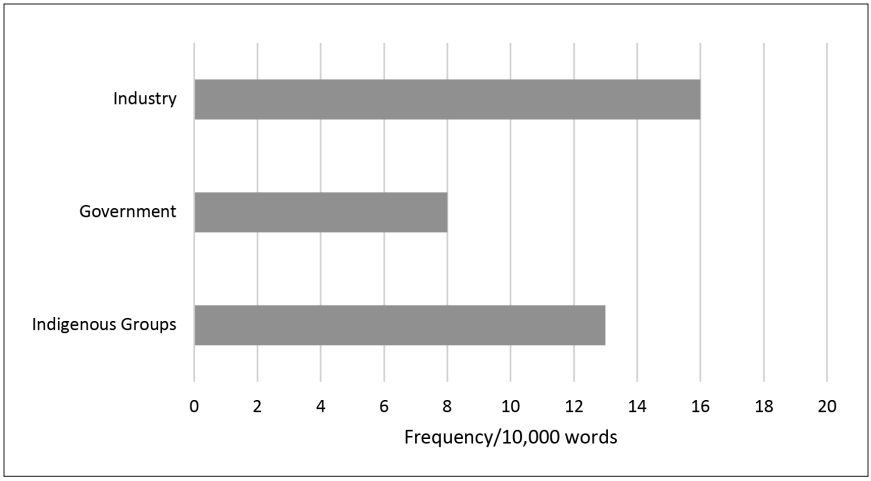

Figure 1.5: Frequency of Use of "Capacity"

Economic and Community Development

A key point raised by the BC First Nations Energy and Mining Council (2008) is that communities should benefit from resource development on their traditional territories, not just be compensated or accommodated for the impacts of development. Industry tends to think of these benefits as directly related to the project (Alberta Chamber of Resources 2006; Cameco 2014; BluEarth Renewables 2015). This includes job opportunities and skills training, opportunities for local businesses to provide services and revenue sharing or partnership agreements. Increasingly, Indigenous communities are thinking beyond immediate job opportunities to revenue sharing, partnerships, equity, and other agreements, which provide more direct involvement in projects and contribute to community development (Hupacasath First Nation 2006; BC First Nations Energy and Mining Council 2008; National Centre for First Nations Governance 2009).

However, we found that even though industry mentioned economic development more than community development, they referenced both more than Indigenous groups. The Prospectors and Developers Association of Canada (2014) states that "industry can view this situation as a 'double tax,'

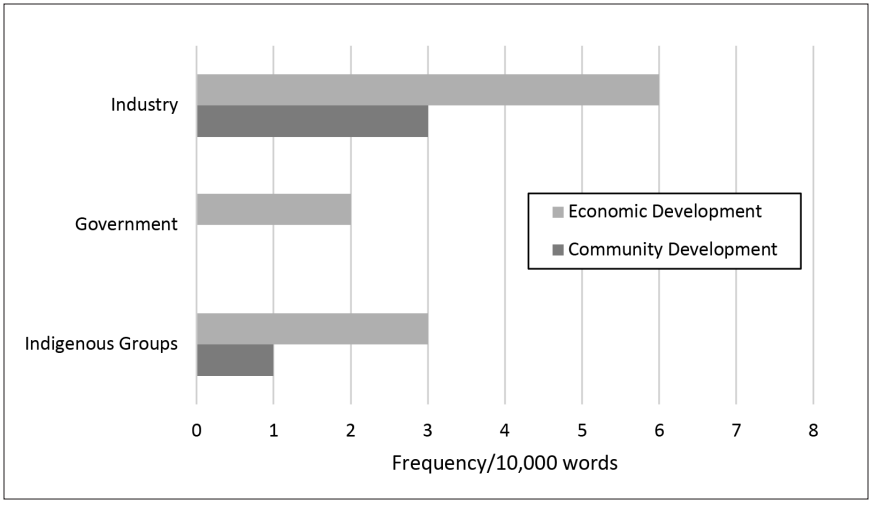

Figure 1.6: Frequency of Use of "Community Development," and "Economic Development"

given that companies pay fees, taxes and royalties to federal, provincial and territorial governments, as well as contribute funds to Aboriginal communities through commercial arrangements." It is also important to note that discussion of training and education often focused on trades, rather than employment at the management and executive level (Alberta Chamber of Resources 2006; Forest Products Sector Council 2011; Cameco 2014). The Forest Products Sector Council document also notes that more opportunities need to be created for Indigenous women.

Information-Sharing and Transparency

Lack of information-sharing and transparency in consultation and engagement processes was a common barrier referenced by all groups. Figure 7 demonstrates Indigenous groups and government discussed the issue more frequently than industry. Government policies stress the importance of documenting all activities and materials that are undertaken related to consultation to demonstrate to the courts how it has fulfilled its legal obligations (Fisheries and Oceans Canada 2006; AANDC 2011; Government of Newfoundland and Labrador 2013). This includes events, telephone calls, emails, site visits, and notifications about activities. Governments encourage project proponents to

record all engagement activities as well, and share them with government, as they can contribute toward the Crown's responsibility. For Indigenous groups, the issue is the transparency and communication of project information and government decision-making (Cragg and Siebenmorgen 2011; National Centre for First Nations Governance n.d.).

Government and industry warn that essentially no conversations should be off the record because this information may be required to prove to the courts that consultation occurred (AANDC 2011; Government of Saskatchewan 2013). However, this can potentially impede the establishment of good relationships. The First Nations Leadership Council (2013) states that "no relationship, whether Crown-Aboriginal, federal-provincial, spouses, or otherwise can be enlivened if every contact or engagement is on the record." The Federation of Saskatchewan Indian Nations (n.d.) indicates "First Nations need to approach all discussions cautiously and with a view that all discussions with the Crown may ultimately be presented as evidence in a court to determine whether the Crown is justified in infringing a First Nation's Treaty or First Nation rights or First Nation title and document, confirm and retain all dialogue." Indeed, we found that Indigenous groups reference the terms *document(s)* and *documentation* significantly less than industry and government.

An important concern for governments was co-ordinating information among departments and agencies to improve communication and decision-making within government (Government of Alberta 2014; Government of Nova Scotia 2015). This included formal processes (e.g., centralized record keeping), and informal avenues (e.g., meeting and discussions among departments). For industry, a priority was having face-to-face meetings with communities, rather than by phone or email, to establish relationships (BluEarth Renewables 2015; Calgary Chamber of Commerce 2015). All actors noted the importance of providing information in an accessible and culturally appropriate format, rather than long technical reports (for example, Canadian Energy Pipeline Association [2014], Government of Saskatchewan [2013]; Assembly of First Nations of Quebec and Labrador [2015]; Suncor [2016]). This was an important component of the *Clyde River* decision, where the proponents provided what the courts referred to as a "practically inaccessible document dump" where "only a fraction of this enormous document was translated into Inuktitut" ([2017] SCC 40: sec. 49).

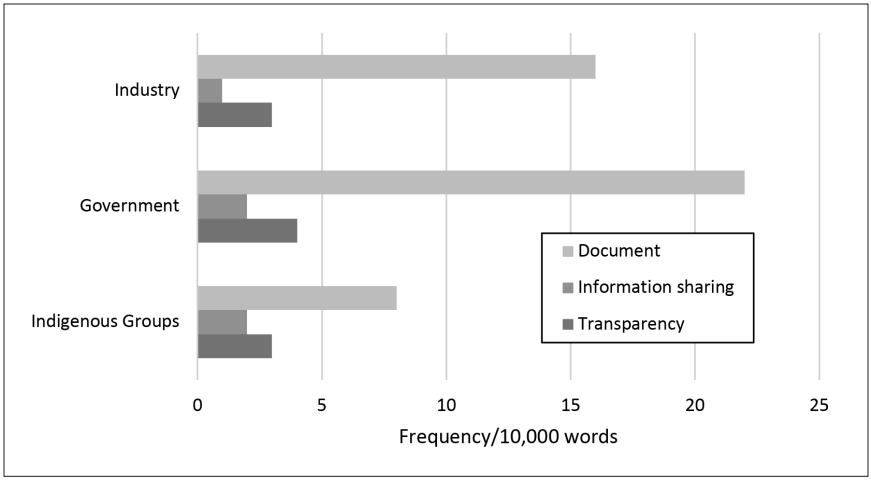

Figure 1.7: Frequency of Use of "Document," "Information-Sharing," and "Transparency"
Note: The "document" frequency count includes the sum of "document" and "documentation."

Traditional Knowledge

As mentioned above, the lack of inclusion of traditional knowledge in decision-making processes has been a barrier to effective consultation in the past. This theme was discussed in the documents of all actors; however, Indigenous groups and industry mentioned traditional knowledge twice as frequently as government (figure 8). There is an acknowledgement within government and industry that efforts should be made to understand and consider this when consulting and engaging. For example, the Alberta Chamber of Resources (2006) states "the first step is to understand cultural differences; the next step is to bridge them—not to change them." Some industry documents suggest the inclusion of traditional knowledge can improve project development, in addition to defining Indigenous rights and providing more fulsome participation in decision-making (Association for Mining Exploration British Columbia 2015; Mining Association of Manitoba 2016). This is in line with scholars who have noted that Indigenous knowledge can improve decision-making and should be incorporated into environmental assessment processes (O'Faircheallaigh 2007; Lambrecht 2013). Indeed, discussion of sustainability originates primarily from Indigenous groups and industry. The main themes include concerns regarding the protection of traditional land,

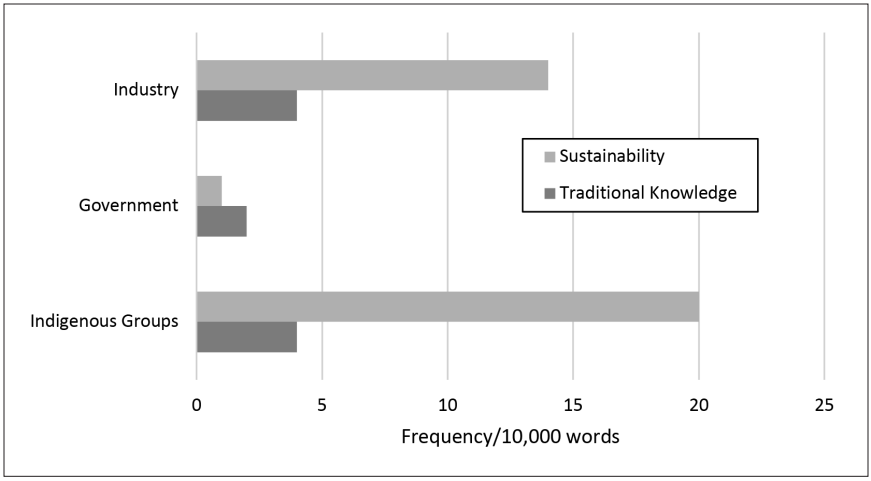

Figure 1.8: Frequency of Use of "Sustainability" and "Traditional Knowledge"
Note: The "traditional knowledge" frequency count includes the sum of "traditional knowledge," "traditional ecological knowledge," "Indigenous knowledge," "Aboriginal knowledge," and "local knowledge."

the benefits of self-monitoring of approved projects, the provision of land use guidelines to project proponents, and the importance of negotiating long-term employment. The Government of British Columbia's (n.d.) consultation guideline is one of the few government documents that encourages the use of Indigenous knowledge of the land as a means of preserving the environment.

Working toward the inclusion of Indigenous knowledge in a meaningful way is difficult and requires more than simply reading a report or viewing information without someone to explain it. For example, the First Nations Leadership Council (2013) stresses the need to have Elders or knowledge holders present during the decision-making process to interpret and communicate traditional knowledge, rather than simply making maps or charting important sites. The importance of Elders and other informal leaders in preserving, protecting, and promoting culture and tradition was an important theme emerging from our analysis. Industry and government frequently identified the need to connect and develop relationships with these individuals (Government of Saskatchewan 2013; Association for Mining Exploration British Columbia 2015). This is not just to involve these individuals, as it was noted the involvement can also improve the project. The Government of

British Columbia (n.d.), in a document for proponents on building relationships with First Nations, states "First Nations hold a wealth of knowledge about the diversity and interactions among plant and animal species, landforms, watercourses and other biophysical features. Companies may benefit from this knowledge in order to build new practices for protecting and conserving resources, including heritage resources individuals, in addition to formal band or tribal leadership."

Summary and Conclusions

The goal of this chapter was to provide a quantitative analysis of policy statements and guideline documents related to consultation and engagement produced by Indigenous groups, government, and industry to assess their understandings of key issues and concepts. Our research has uncovered several key conclusions that should be considered in the design of consultation and engagement processes.

The term *consultation* was the most common way Indigenous groups, government, and industry talked about Indigenous involvement in resource development. Discussion of broader engagement and substantive accommodation was less common. Somewhat surprisingly this was the case for industry, even though they are not directly responsible for fulfilling the legal duty to consult. However, the government used the term *consultation* substantially more, in comparison to the two other terms. This suggests that governments may be more concerned with fulfilling the formal requirements of consultation rather than the broader spectrum of activities that could fall under engagement. It also supports the hypothesis that government is less concerned with the substantive accommodation than the procedural requirements of consultation.

Indigenous groups' documents revealed that resource development is often thought of in the context of reconciliation. This concept is much less prominent in industry and government documents. The perspective provided by Indigenous groups is that resource development cannot be approached as a regular business or government transaction—it is a distinct and unique relationship. The primary reason for this is that Indigenous communities and nations are rights holders, not stakeholders. While the concepts of reconciliation and respect are much less frequently referenced by government and industry documents, the term *relationship* was used with the same frequency in industry documents as Indigenous groups' documents (40 per 10,000),

indicating an attitude more in line with the concept of reconciliation than might otherwise be inferred.

In terms of the concept of *accommodation*, there was relatively similar frequency of use by Indigenous groups (78) and government (104). However, our textual analysis reveals different viewpoints. Indigenous groups' language reflects substantive components of accommodation, such as changes to projects and compensation. In contrast, the government documents discussed accommodation as part of reaching compromise and focused on procedural aspects.

One instance where perspectives and objectives differed was around the timing of consultation. An important concern for Indigenous groups was that consultation processes are often rushed, and that insufficient time is dedicated to establishing trusting relationships and allowing for respectful and meaningful consultation. There is a clear tension between the time required for meaningful consultation and business risk due to delays, increasing costs, and lost windows of opportunity. Interests are not aligned in this case, and documents offered little in the way of solutions to this conundrum.

Our analysis revealed that the capacity of Indigenous communities to fully participate in consultation and engagement was recognized as a challenge by all three groups. As a corollary, effectively addressing the challenge through capacity building and the provision of supports was also recognized as an issue. Industry documents also noted financial concerns associated with industry-provided support for capacity building and community and economic development.

Another point of alignment amongst the three actors was the concept of information-sharing and transparency. While the concepts were not very important in terms of frequency of use, all groups agreed that transparency is a positive element of relationship-building. On the negative side, however, is government's focus on documentation and the procedural aspect of information-sharing, something that was often viewed negatively in the documents of Indigenous groups.

The lack of inclusion of traditional knowledge in decision-making processes was a theme discussed in the documents of all groups and was acknowledged as a barrier to effective consultation. Indigenous groups and industry documents were more focused on the concept of sustainability. Some industry documents suggest the inclusion of traditional knowledge can improve

project development, in addition to defining Indigenous rights and providing more fulsome participation in decision-making.

Scholars have highlighted many issues with the institutions and processes used to engage Indigenous Peoples, including issues with delegation, asymmetries in information about projects and funding for gathering that information, and the cumulative effect of consultation on Indigenous communities (Booth and Skelton 2006; Ritchie 2013). Particularly concerning are projects—such as the Site C Dam and Trans Mountain Pipeline—where Indigenous groups have asserted that the duty to consult had not been meaningfully implemented but projects were allowed to proceed. These instances suggest that the duty to consult may be used as a minimum procedural necessity rather than as a mechanism of authentic engagement (Manuel and Derrickson 2017). This chapter contributes to this line of inquiry by examining how Indigenous Peoples view and understand key concepts related to consultation and engagement processes and compare them to those of government and industry. The limitation of our work is that we examine policy documents and it is not feasible in the scope of this project to determine how closely these guidelines and statements are followed in practice. Clearly, more work is needed in this area to understand how Indigenous Peoples view consultation and engagement processes. The case studies of specific processes and communities in this volume are a starting point for better understanding.

Several Indigenous groups' documents suggest that existing processes, such as environmental assessments, are unlikely to satisfy the duty to consult unless they are particularly robust (Assembly of First Nations of Quebec and Labrador 2005; First Nations Leadership Council 2013). In addition, a common theme from our analysis is that meaningful consultation requires involving Indigenous Peoples in the design of the consultation process itself. This supports the argument that institutions and processes are still defined and controlled by the state, which limits the extent to which they will empower Indigenous People in decision-making (Alfred 2001; Borrows 2016; Palmater 2016; Simpson 2017). Therefore, future work should examine what processes, mechanisms and tools are seen by Indigenous Peoples as representing their interests, cultures, and traditions and what new institutions can be developed with Indigenous People to replace those that do not. The other chapters in this book are a start in this direction.

Third, as argued by Sossin (2010), Borrows (2016), and Simpson (2017), while the duty to consult aims at achieving procedural fairness for Indigenous

Peoples and respect for their constitutional rights, it is not yet clear whether it will lead to substantive outcomes. There is an opportunity for more research on the link between consultation and engagement activities and the outcomes of development in communities. There are several reasons why this is the case. The most commonly cited issues are the difficulty in measuring social, cultural, and emotional benefits, which are less easily specified than economic benefits, and the relationship between these broad categories of benefits (North Slave Métis Alliance 1999; Tsetta et al. 2005; Campbell 2007; Westman and Joly 2019; Zurba and Bullock 2020). It takes a long time to collect the longitudinal data necessary to assess the impact of development (North Slave Métis Alliance 1999; Angell and Parkins 2011; Papillon and Rodon 2017). Finally, work on how the benefits of development are distributed within communities, including gendered analysis, is only beginning to emerge (Amnesty International 2016; Nightingale et al. 2017; Manning et al. 2018). Thus, determining whether the institutions and processes used to involve Indigenous Peoples in decision-making has led to substantive improvements in community socio-economic status is difficult at best. The other chapters in this volume focus largely on whether institutions and processes increase power in decision-making, although Wyatt and Dumoe (chapter 6) in this book provide some evidence on community benefits in their case study of Meadow Lake Reserve.

NOTES

1 We thank the Social Sciences and Humanities Research Council for funding this research, and Kiran Gurm, Kristy Peterson, and Brittney Whittaker for their excellent research assistance. We thank Emily Galley for very helpful comments on our draft.

2 We note that only recently Canadian governments switched to using the word "Indigenous"; instead, the term "Aboriginal" is used in the context of Canada's constitution and includes First Nations, Inuit, and Métis. We choose to use the term Indigenous as the most inclusive collective noun, as recommended by First Nations and Indigenous Studies, University of British Columbia on the Indigenous Foundations website and Indigenous Corporation Training (2016). Our use of alternative terms reflects the use of those terms in works cited in order to maintain scholarly accuracy and the intent of the original work.

3 Consultation refers to the Crown's obligation to meaningfully consult with Indigenous Peoples prior to the Crown making a decision or taking a course of action that may affect their rights and privileges, in accordance with Section 35 of the Constitution Act and the many subsequent provincial court, Supreme Court, and Federal Court of Appeal rulings on this matter. Project proponents are frequently required to engage

with Indigenous communities in support of the Crown fulfilling its obligations. Engagement refers to a broad range of actions taken by companies and government departments as they interact with Indigenous Peoples to find common ground when the relevant authorities are assessing a proposed project.

4 Yukon and Nunavut are excluded, as they did not have publicly accessible policy documents at the time of analysis.

5 The exception is "accommodation," which has a frequency of only 31 per 10,000 words in industry documents.

6 Canada's Indigenous relations ministry has undergone several transformations. Originally the Department of Indian Affairs and Northern Development (the legal title), its applied title changed to Aboriginal Affairs and Northern Development Canada (AANDC) in 2011, and then to Indigenous and Northern Affairs Canada in 2015 (Derworiz and Albers 2018). It dissolved into two ministries in 2017: Crown-Indigenous Relations and Northern Affairs Canada and Indigenous Services Canada. In 2018, Crown-Indigenous Relations and Northern Affairs Canada became Crown-Indigenous Relations and the northern affairs portfolio moved to a new ministry of Intergovernmental and Northern Affairs and Internal Trade. Throughout this chapter, we refer to the documents produced by the ministry as published at the time.

7 However, the Government of Newfoundland and Labrador (2013) indicates that "since Aboriginal consultation is included as part of the project assessment, proponents are required to provide reasonably necessary capacity funding to facilitate the provision by Aboriginal organizations of pertinent information on potential impacts of project specific activities on asserted Aboriginal rights and any required financial compensation."

Appendix: List of Documents in Detailed Review

In this appendix we list the documents we collected between 2016 and 2018, and which form the data for our analysis.

Government

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